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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 8th MEETING

Held at the Austria Center Vienna,
on Monday, 8 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 2.45 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Article 5 (continued) (A/CONF.152/C.1/L.39)

1. Mr. ROMAN (Belgium), introducing the proposal in document A/CONF.152/C.1/L.39, said that the additional paragraph would help to balance the rights and the duties of the operator by exonerating him from liability for loss or damage to the goods following the customer's failure to take delivery of the goods.

2. Mrs. EL OTMANI (Morocco), supporting the proposal, said that there was a link between the fact of goods being left in the operator's hands and the period of his responsibility. It was already established that in practice the operator's responsibility would cease once the goods were placed at the customer's disposal.

3. Ms. SISULA-TULOKAS (Finland) said she was sympathetic to the idea embodied in the proposal but thought it pertained to article 3 rather than article 5.

4. Mr. BELLO (Philippines) said that he could support the proposal if the words "within a reasonable period" were replaced by a specific time-limit, such as five days. A time-limit should also be laid down in paragraph 3 of article 5.

5. Mr. ROJANAPHRUK (Thailand) said that the point raised in the Belgian proposal was adequately covered in article 3; there was no need for an additional paragraph on the matter in article 5.

6. Ms. JØRGENSEN (Denmark) said that the proposal did not affect the operator's liability as such. It was concerned with the period of the operator's responsibility under article 3 and added nothing except a requirement for the operator to notify the person entitled to take delivery of the goods. She did not favour any such addition, either to article 5 or to article 3.

7. Mr. TARKO (Austria) agreed. The point at issue was already covered by article 3. Furthermore, he questioned the repeated use of the word "delivery" in respect of the goods. The operator was not a carrier; he simply placed the goods at the disposal of the customer.

8. Mr. ILLESCAS (Spain) agreed that the draft must strike an appropriate balance between the rights and the duties of the operator; however, the point raised in the Belgian proposal appeared to be covered by article 3. Moreover article 10 (3), by enabling the operator to sell the goods if they were not collected, provided him with a means of curtailing the period for which he remained responsible for them. Thus his liability in the case contemplated by the Belgian proposal was already limited. His delegation would be reluctant to approve the Belgian proposal if the operator was thought to be sufficiently protected by articles 3 and 10.

9. Mr. LARSEN (United States of America) agreed. He too felt that the issue raised in the Belgian proposal pertained to article 10 rather than article 5. His own delegation had submitted a proposal for article 10 (A/CONF.152/C.1/L.15) whereby the goods would be treated as abandoned if unclaimed within a specified period of time. The problem of the operator's liability in such cases should be resolved in article 10 rather than in articles 3 or 5.

10. Mr. RUSTAND (Sweden) said that the point at issue was not the basis of the operator's liability but the period of his responsibility for the goods. The period of responsibility would be rendered more, not less, uncertain by the words "a reasonable period" which appeared in the Belgian proposal.

11. Mr. GOKKAYA (Turkey) supported the proposal. The operator must not be forced to assume responsibility for the goods for an indefinite period. Since interpretations of the term "reasonable period" were bound to differ, he suggested replacing it by a fixed time-limit of 30 days.

12. Mr. NAOR (Israel) thought the Belgian proposal was redundant. Its only effect would be to extend the period of the operator's responsibility slightly beyond the period provided in article 3.

13. Mr. CHRISTOV (Bulgaria) said he could support the Belgian proposal with the amendment suggested by the representative of Turkey.

14. Mr. WANG Yangyang (China) said that the addition of a provision in article 5 to protect the operator, along the lines proposed by Belgium, would be justified. However, the proposal failed to specify a time-limit for the operator to notify the customer that the goods were available for collection.

15. Mr. ROMAN (Belgium) noted that considerable support had been expressed for his delegation's proposal, but there was also a widely-held view that article 5 was the wrong place for it. The Committee could perhaps deal with the point under article 10.

16. The CHAIRMAN observed that the reasonable period of notice contemplated in article 10 referred to the exercise of the operator's right of retention, not to his responsibility for the goods. A separate decision must be made on each question. The effect of the Belgian proposal would be to establish that the operator's responsibility for the goods lasted for a "reasonable period" after notification had been given that they were available for collection, and ceased when that reasonable period expired. A formal decision was required on that principle.

17. Mr. RUSTAND (Sweden) said that if the principle underlying the proposal was accepted and the wording of the proposal improved, its best place might be in article 3.

18. Mr. BONELL (Italy) pointed out that article 3 had been approved by the Committee and could not be amended. As to article 10, there was no apparent link between the United States proposal for that article and the Belgian proposal for article 5.

19. Mr. LEBEDEV (Union of Soviet Socialist Republics) wished it to be made clear whether the Belgian proposal would extend the period of the operator's responsibility beyond the period envisaged in article 3.

20. Mr. ROMAN (Belgium) said that the proposal would exonerate the operator from liability for loss or damage to the goods when a reasonable period after the goods had been placed at the disposal of the customer had expired.

21. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.39).

22. The proposal was rejected by 17 votes to 13, with 4 abstentions.

23. Mrs. EL OTMANI (Morocco) said that the term "failure" was used in article 5 (2), whereas in the corresponding provisions of the Hamburg Rules the expression used was "fault or neglect". She would prefer the new Convention to employ the terminology of the Hamburg Rules, since the functions of a port operator supplemented those of the maritime carrier. In Moroccan law the term "failure" implied a very broad degree of responsibility and would be interpreted as making port operators liable for the slightest failure of any sort, whereas "fault or neglect" would mean that the port operator had omitted to perform a particular act. The present difference in terminology between the Convention and the Hamburg Rules would have very harmful implications for the operator.

24. The CHAIRMAN said that in the context of article 5 (2) the term "fault" would carry a moral connotation which was inappropriate. The word "failure" did not attribute blame and indicated merely that the operator's responsibility was not properly discharged.

25. Mr. BONELL (Italy) said that the term "failure" constituted a departure from both the UNIDROIT draft and the Hamburg Rules. "Fault" would be a more appropriate term than "failure". Failure to perform a certain act implied that there was no need to inquire into the conduct of the defaulting party, whereas a stipulation of fault placed the burden of proof on that party. The term "fault" should always be used where negligence was implied, as in article 5 (1). His preference would therefore be for the words "fault or neglect" to replace the word "failure" in article 5 (2).

26. Mr. SWEENEY (United States of America) agreed. The term "failure" denoted a contractual element; however, the basis of article 5 was not simply contractual since it involved elements of both delict and tort. From that point of view "fault" was a more appropriate term. For the sake of conformity with the Hamburg Rules, it should replace the term "failure".

27. Mr. PAMBOU-TCHIVOUNDA (Gabon) said that his delegation was in favour of using the terminology of the Hamburg Rules since it was an accepted part of international trade law.

28. Mr. ILLESCAS (Spain) said that his delegation was in favour of the text as it stood: paragraph 2 of article 5 described quite clearly the sort of failure which would determine the operator's liability, namely, his failure to carry out the measures described in paragraph 1. In that context the use of the word "fault" could be misleading.

29. Mr. WEISER (International Union of Marine Insurance), speaking at the invitation of the Chairman, pointed out that article 17 of the United Nations Convention on International Multimodal Transport of Goods (the Multimodal Convention) used the same terminology as the Hamburg Rules. It would be detrimental to all three conventions if the present one, which was designed to fill the gaps between the other two, introduced new terminology.

30. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) said that his delegation preferred the expression "fault or neglect" because it considered it more precise.

31. Mr. WANG Yangyang (China) said that his delegation wished to retain the term "failure". The translation into Chinese of the word "failure" was very different from that of "fault": failure meant omitting something, whereas fault related to wrongdoing. The problem should be referred to the Drafting Committee and not be determined by a vote.

32. Mr. ILYTCHEV (Union of Soviet Socialist Republics) said that the word "failure", meaning omission of the necessary measures, was more universal in scope than the word "fault". His delegation therefore preferred the text drafted by the Commission.

33. Mr. RAO (India) said that his delegation had no strong views about either word but basically preferred the text as it stood. The operator's duty under paragraph 1 of article 5 was to take all measures that could reasonably be taken to avoid the prejudicial occurrence and its consequences. The manner in which the article dealt with failure in that duty was merely descriptive. Instead, therefore, of trying to particularize the notion of failure the Committee should simply allow it to stand in article 5. In practice the courts would interpret it in a liberal manner, which would necessarily involve consideration of the notion of fault or neglect.

34. Mr. FILIPOVIĆ (Yugoslavia) said that, as he saw it, the word "failure" meant insufficiency as measured by certain legal standards, which could mean fault or neglect. The two terms therefore amounted to the same thing, although the word "failure" as used in paragraph 2 might be broader and therefore more suitable.

35. Mrs. PIAGGI DE VANOSSI (Argentina) reminded the Committee that when the subject had been discussed at the twenty-second session of the Commission it had been concluded that failure was not the same as fault or neglect.

36. Mr. MARSHALL (United Kingdom) said that the word "failure" in paragraph 2 served purely to apply the proportionality criterion set out in that paragraph to any liability that might arise under paragraph 1. The use of the word "failure" ensured a much more complete application of that criterion than the expression "fault or neglect".

37. The CHAIRMAN observed that the Committee seemed highly divided on a subject which was not normally one on which a vote would be taken. He therefore suggested that the Drafting Committee be invited to take up the point.

38. Mr. BONELL (Italy) said that he did not consider the question to be a matter of overwhelming importance but it might perhaps be more than just a drafting issue.

39. The CHAIRMAN asked whether there were any delegations for whom the present wording was unacceptable.

40. Mrs. EL OTMANI (Morocco) reiterated her delegation's objection to the use of the term "failure".

41. Mr. PAMBOU-TCHIVOUNDA (Gabon) shared the objections to the term "failure" voiced by the representative of Morocco. However, the choice of expression would depend on whether the system of liability to which the new Convention referred was based on risk, in which case "failure" might be more appropriate, or on fault. The use of the expression "failure" would, as the representative of Morocco had stated, create unnecessary difficulties for the operator in that any shortcomings on his part would have to be defended. That would raise particular problems in the developing countries. In drafting legislation, efforts should be made to avoid regional subjectivity and employ objective considerations based on common sense that would be acceptable to all.

42. Mr. ABASCAL (Mexico) drew the Committee's attention to article 14 of the draft Convention, which emphasized its international character and the need to promote uniformity in its application. That would rule out any interpretation based on national legal systems. In article 5, "failure" meant failure to take the specific measures defined in paragraph 1. The text as it stood was therefore better.

43. The CHAIRMAN agreed that the expression "failure" was clearly to be interpreted in relation to the Convention as a whole and not to any meaning that it might have in a specific legal system. He had heard only two delegations which had been emphatic in their opposition to the use of the word "failure". Unless, therefore, he heard any further objection, he would take it that the Committee approved the text of article 5 as it stood, for referral to the Drafting Committee.

44. It was so decided.

45. Mr. FALVEY (United States of America) said that he wished to share with the Committee his delegation's interpretation of the approved text of article 5. Concern had been expressed by operators in the United States and elsewhere that a strike by their employees might be deemed a cause of damage or delay under the Convention. The approved text would provide the operator with a defence in the event of a strike, should he have taken all appropriate action permitted under local law to deal with a strike situation, which might include bona fide negotiations; if he had taken such action he would not be held liable for the loss or damage occasioned by a strike on the part of his employees, ex-employees or agents' employees.

The meeting was suspended at 4.05 p.m. and resumed at 4.40 p.m.

Article 6 (A/CONF.152/C.1/L.12, L.27, L.45, L.51)

46. Mr. OCHIAI (Japan) introduced his delegation's proposal for the addition of a new paragraph (1) (c) to article 6 (A/CONF.152/C.1/L.27). The text was inspired by the second sentence of article 22 (2) (b) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention) as amended by the Hague Protocol of 1955. Its purpose was to provide for situations in which partial loss or damage could affect the whole of a consignment - when, for example, a piece of machinery was shipped in two packages, one of which was lost or damaged.

47. Mr. ILLESCAS (Spain) endorsed the proposal as a useful stipulation.

48. Ms. JØRGENSEN (Denmark) also approved the proposal, which reflected her country's understanding of the issue.

49. Mr. CHRISTOV (Bulgaria) considered the Japanese proposal to be just, but also superfluous in so far as its principles merely echoed the general principles of civil liability.

50. Mr. BELLO (Philippines) said his delegation could accept the proposal if it was approved on the understanding that it would be articulated with the proposal submitted by Germany in document A/CONF.152/C.1/L.12, which sought to add to article 6 (1) the notion of units of account per package or other shipping unit.

51. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran) joined in approving the Japanese proposal.

52. The Japanese amendment to article 6 (1) was adopted by 12 votes to 7, with 15 abstentions.

53. Mr. LEBEDEV (Union of Soviet Socialist Republics) observed that the number of abstentions might imply that insufficient time had been devoted to consideration of the Japanese proposal. He took it that the Committee had approved the idea it

(Mr. Lebedev, Union of Soviet Socialist Republics)

embodied but might wish to reflect a little further on its formulation. In particular, thought might be given to the question of identifying accurately the goods described as those whose value was affected, and indeed to all the implications of that phrase.

54. The CHAIRMAN said that the Drafting Committee might consider the most suitable point at which to insert the Japanese proposal in the draft Convention, and might seek some improvement in the wording. The text was intended to provide guidance to courts in determining the limit of the operator's liability. Since it was derived from the Warsaw Convention as amended by the Hague Protocol - which had already served as the basis for at least one lengthy ruling in law - it would be wise to approach with caution any suggestion for altering the language which the Committee had just approved, and to align it as closely as possible with that of the instrument from which it was derived.

55. Mr. SCHROCK (Germany) introduced paragraph 1 of his delegation's proposal in document A/CONF.152/C.1/L.12, calling for the deletion of subparagraph (b) of article 6 (1). The rationale for that amendment had been set out in detail in paragraph 5 of his delegation's comments on the Commission's draft (A/CONF.152/7), which he read out to the Committee. In proposing the deletion of subparagraph (b), the German delegation was conscious that the decision whether or not to retain it was quite closely related to whatever limits of liability were to be adopted by the Conference: the position of a number of delegations, including possibly his own, with regard to article 6 (1) (a) and 6 (1) (b) would undoubtedly be influenced by agreement on relatively high or relatively low amounts. For its part, his delegation believed that the higher those amounts might be, the less would be the reason for retaining subparagraph (b).

56. The CHAIRMAN pointed out that the effect of the German proposal would be to reintroduce the notion of a single limit of liability, regardless of the mode of transport involved; that notion had been discussed at an early stage of the Commission's deliberations and subsequently set aside in accordance with the prevailing view that the dual-limit approach was preferable. He suggested that the Committee's work would be expedited if members first pronounced on those two options before examining the article further.

57. Mr. CHRISTOV (Bulgaria), after alluding to the relationship between the draft Convention and the equivalent provisions of the Hamburg Rules, and to the distribution of liabilities between the operator and his customer, said that his delegation would not object to a single limit if it corresponded to paragraph (1) (b) of the Commission's draft. On the other hand, it could see the merits of - and tended to favour - the dual-limit approach in the form in which the Commission had proposed it.

58. Ms. JØRGENSEN (Denmark) supported the German proposal. Her delegation favoured a single limit of liability at least as high as that proposed in paragraph 1 (a).

59. Mr. BONELL (Italy) said that it was difficult to express a view on a single aspect of the question of limits of liability without knowing how its other aspects would be settled. In the case of the choice between a single and a dual system, it was hard to reach a definite decision without knowing what figure would be set. For the time being, he would express a preference for a higher limit than that provided for in paragraph 1 (b), possibly as high as that set in paragraph 1 (a). The more the Convention departed from the limit set in 1978, when economic conditions had

(Mr. Bonell, Italy)

been very different, the more he would favour a single-limit approach. However, as long as the precise figure was not known, he could do no more than express a preference. The best way of proceeding might be to get the feeling of the Conference and proceed step by step, on the understanding that the possibility should be considered of revising a preliminary decision on the matter if it proved necessary.

60. Mr. TARKO (Austria) said that his delegation supported the German proposal for a single limit of liability. It was also in favour of a limit at least as great as the 8.33 units of account mentioned in paragraph 1 (a).

61. Mr. MARSHALL (United Kingdom) agreed that there was considerable logic in having a single limit. The Committee was, after all, considering the case of one operator and his ability to react to losses when they occurred and to compensate those losses. However, that must be put in the context of the difference between the two levels of liability provided for in the Multimodal Convention and the differences among the limits provided for in the various unimodal transport conventions. It was not only the value of the goods carried which determined the carrier's liability or, in the case of the present Convention, that of the operator, but also the ability of the operator or carrier to find suitable insurance coverage if he was to be able to pay compensation when he was liable. In the case of road transport, for example, if only a single truck was involved, the concentration of loss was not large; it would be possible to compensate for the loss even if there were very high value goods inside the truck. On the other hand, the limit of liability for transit by sea was much lower, as it must be considering the size of the vessel and the enormous concentration of values. The sea carrier found it difficult and expensive to insure himself for a suitable amount to afford him protection and that was why a lower level of limit of liability had been set in the Hamburg Rules.

62. In the case of the operator of a transport terminal, it should be remembered that, if he was to be exposed to a single limit or even to two limits, what was involved was a port area which might have goods in it whose value was many times greater than that of the goods in a single vessel. Thus, if the Committee were to move to a single and higher limit, it would find that, apart from the lack of comparability between the various transport conventions, the operator would have to protect himself to a far greater extent. In many cases, where the capacity of the insurance market was limited, the operator might have difficulty in finding an insurer and might indeed have to operate uninsured. He was sure that many countries, both developed and developing, that had large State-run terminals would be unhappy with the present Convention if it stipulated such high limits that the operator's liabilities would be enormous in the event of a catastrophe.

63. Mrs. EL OTMANI (Morocco) said that she agreed entirely with the previous speaker and favoured the dual system proposed in the draft Convention. She pointed out that under paragraph 1 (b) an operator receiving goods immediately after their carriage by sea was already being asked to bear a liability greater than that stipulated for the sea carrier in the Hamburg Rules. It would have been preferable to align the limits.

64. Mr. LARSEN (United States of America) said that his delegation believed that the Convention should, to the extent possible, make the terminal operator's liability uniform with the limit of liability for the mode of transport used to carry the goods. There should therefore be a dual system. If carriage was principally by sea, the limit should be generally uniform with that applicable to

(Mr. Larsen, United States of America)

sea transport. If carriage was principally by land, the limit that applied to the land portion of the journey should prevail. The choice would be made by the shipper; if he sent goods by sea, which was the cheaper means, he faced the possibility of greater risk. He would have to take care of that risk himself, however, since the carrier would bear a lower level of liability. In the case of surface or air transport, a higher level of liability would apply. But the Committee must also consider the effect of inflation since 1980, when the limits set in the Multimodal Convention had been determined. According to statistics provided by the International Monetary Fund, the amounts set had lost about one third of their value. Accordingly, his delegation supported setting dual limits of liability but wished those limits to be updated to take account of their erosion by inflation.

65. Mr. RUSTAND (Sweden) associated himself with the views expressed in favour of providing for a dual system in the draft Convention. It was true, as the representative of Germany had pointed out, that goods sent by sea could be of great value but they were normally less valuable than those transported by other means. His delegation was therefore in favour of retaining the dual system.

66. Mr. HORNBY (Canada) also advocated the inclusion of the dual system in the draft. He believed that the guiding principle should be that the operator of a transport terminal should be subject to no less favourable limits of liability than those applicable to the carrier. That might be difficult to ensure in cases in which there was a lack of uniformity between the provisions applicable, but observance of the principle could be better achieved by a dual system such as that contemplated in the Commission's text.

67. Mr. ZHAO Chengbi (China) also thought that a dual system would be fairer. Under existing unimodal conventions, air and sea transport had very different limits of liability. Combining the different limits and asking all countries to recognize them would create difficult problems.

68. Mr. WEISER (International Union of Marine Insurance), speaking at the invitation of the Chairman, said that he too favoured a dual system, as contemplated in the Multimodal Convention. He believed that not only the value but the amount of cargo carried by a vessel had influenced the decision to institute a dual system in that Convention. Insurance cover would be needed; if the draft Convention provided for a single system the insurance would be very expensive and problems of market capacity would arise, especially in developing countries.

69. Mr. MUTZ (Observer, Intergovernmental Organization for International Carriage by Rail) said that he was aware of the political nature of the question under discussion and that in such a case the views of an observer might not carry the same weight as they would in technical matters. He also knew that the share of rail transport in international trade was much lower than that of sea carriage. He noted, however, that railways were both operators of transport terminals and clients of such terminals. He believed that a liability system which differentiated between modes of transport would, in practice, complicate the situation. The lower liability in the case of goods to be handed over by the operator for carriage by sea might give rise to litigation. In 1956, when the Convention on the Contract for the International Carriage of Goods by Road (CMR) had been adopted, a limit of liability had been set of 25 gold francs - currently 8.33 units of account per kilogram - and was still in force. At that time the limit for transport by rail was four times as large, namely 100 gold francs, but in 1970 it had been reduced by half to the present limit. It was perhaps not always desirable to start from too low a point

(Mr. Mutz, Observer, Intergovernmental Organization for International Carriage by Rail)

and it would not be advisable for the limit of liability to develop in that direction. However, while it could be argued that the value of goods was higher in one form of transport than another, it was undeniable that for all modes of transport the value of all goods carried had increased a great deal in the last decade and would go on doing so.

70. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that one factor which had been taken into account in drafting article 6 had been the need to make the present Convention attractive to the operators of transport terminals by setting them a reasonable limit of liability. Justified fears had been expressed that setting a high limit might result in major operators in various countries, developed and developing alike, being unwilling to support the adoption of the Convention. At the same time, the need to relate limits of liability to the basic forms of transport had also been taken into account. Although it was undoubtedly easy to establish a system of limits for carriers in specific modes of transport, the dual system devised to limit the liability of operators of transport terminals was the most rational in the circumstances. The German proposal was not without merit, but in the last analysis it would be better to keep the system proposed in the draft Convention.

71. The CHAIRMAN said that, if the Committee adopted the proposal by Germany to delete subparagraph (b) of article 6 (1), it would be opting for a single system of limits of liability; if it rejected the German proposal, it would be approving the dual system contemplated in the Commission's draft. He invited the Committee to vote on that part of the German proposal in document A/CONF.152/C.1/L.12.

72. The proposal by Germany in paragraph 1 of document A/CONF.152/C.1/L.12 was rejected by 27 votes to 4, with 4 abstentions.

The meeting rose at 5.40 p.m.